

section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104-20, 2520.104-21, 2520.104-41, 2520.104-46 and 2520.104b-10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare benefit plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, EBSA believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). In its Notice of Proposed Rulemaking, EBSA requested comments on the appropriateness of the size standard used; no comments were received.

On this basis, EBSA has determined that this rule does not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, EBSA has prepared the following final regulatory flexibility analysis.

(1) *Reason for the Action.* The Department is establishing a procedure for an administrative hearing so that states and entities will be able to obtain a determination by the Secretary as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of an exception to section 3(40) of ERISA.

(2) *Objectives.* The objective of these regulations is to make available to plans an individualized procedure for obtaining a hearing before a Department of Labor ALJ, and for appeals of an ALJ decision to the Secretary or the Secretary's delegate. The procedure is appropriate for the resolution of a dispute regarding an entity's legal status in situations where the jurisdiction or law of a state has been asserted against a plan that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements.

(3) *Estimate of Small Entities Affected.* For purposes of this discussion, the Department has deemed a small entity to be an employee benefit plan with fewer than 100 participants. No small governmental jurisdictions are affected.

Based on Form 5500 filings and Form M-1 filings by MEWAs pursuant to interim final rules published in the **Federal Register** on February 11, 2000 (65 FR 7152), it is estimated that there about 2,600 entities that can be classified as either collectively bargained plans or as MEWAs; however, EBSA believes that a very small number of these arrangements will have fewer than 100 participants. By their nature, the affected arrangements must involve at least two employers, which decreases the likelihood of coverage of fewer than 100 participants. Also, underlying goals of the formation of these arrangements, such as gaining purchasing and negotiating power through economies of scale, improving administrative efficiencies, and gaining access to additional benefit design features, are not readily accomplished if the group of covered lives remains small.

The number of small plans found within the group of 2,600 collectively bargained plans or MEWAs is about 200, or eight percent. The Employee Benefits Supplement to the 1993 Current Population Survey and a 1993 Small Business Administration survey of retirement and other benefit coverages in small firms indicate that there are more than 2.5 million private group health plans with fewer than 100 participants. Thus, the 200 small entities potentially affected represent a

very small portion of all small group health plans. Even if all 2,600 potentially affected entities were to have fewer than 100 participants, they would represent approximately one-tenth of one percent of all small group health plans.

The Department is not aware of any source of information indicating the number of instances in which state law or jurisdiction has been asserted over these entities, or the portion of those instances that involved the collective bargaining agreement exception. However, in order to develop an estimate of the number of plans or arrangements that might seek to clarify their legal status by using an administrative hearing as proposed by these regulations, the Department examined the number of lawsuits to which the Department had previously been a party. While this number is not viewed as a measure of the incidence of the assertion of state jurisdiction, it is considered the only reasonable available proxy for an estimate of a maximum number of instances in which the applicability of state requirements might be at issue.

In recent years, the Department has been a party to an average of 45 legal actions annually. The proportion of these lawsuits that involved a dispute over state jurisdiction based on a plan's or an arrangement's legal status is unknown. On the whole, 45 is therefore considered a reasonable estimate of an upper bound number of plans that could have been a party to a lawsuit involving a determination of the plan's legal status. Because this procedural regulation and the related criteria regulation are expected to reduce the number of disputes, the Department assumes that 45 represents a conservatively high estimate of the number of plans or arrangements that would petition for an administrative hearing. Of all small plans and arrangements, then, the greatest number of plans or arrangements likely to petition for an administrative hearing represents a tiny fraction of the total number of small plans.

In addition, the Department has assumed that an entity's exercise of the opportunity to petition for a finding will generally be less costly than available alternatives. Accordingly, the Department has concluded that these regulations will not have a significant economic impact on a substantial number of small entities.

(4) *Reporting and Recordkeeping.* In most cases, the records that will be used to support a petition for a hearing pursuant to these procedures will be maintained by plans and MEWAs in the